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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JAMES DAVIS et al., Defendants and Appellants.	D050956 (Super. Ct. No. SCD195426)

APPEALS from judgments of the Superior Court of San Diego County, Charles G. Rogers, Judge. Affirmed.

A jury convicted defendants and appellants James Davis and Freddie L. Tyson of the following nine offenses, as charged in the amended information:[1] count 1, conspiracy to commit a residential robbery (Pen. Code,[2] § 182, subd. (a)(1)); count 2, residential burglary (§§ 459, 460); count 3, first degree robbery in an inhabited home (§§

1 Count 4, charging kidnapping for robbery and the related enhancement allegation, was dismissed after a hearing pursuant to Penal Code section 995.

2 All further statutory references are to the Penal Code unless otherwise specified.

211, 212.5, subd. (a)); count 5, assault with a firearm (§ 245, subd. (a)(2)); count 6, assault with a firearm (§ 245, subd. (a)(2)); count 7, assault with a firearm (§ 245, subd. (a)(2)); count 8, false imprisonment by force or violence (§§ 236, 237, subd. (a)); count 9, false imprisonment by force or violence (§§ 236, 237, subd. (a)); and count 10, making a criminal threat (§ 422).

The jury found as to all counts that Davis personally used a firearm within the meaning of sections 12022.5, subdivision (a), and 12022.53, subdivision (b), and that Tyson was vicariously armed within the meaning of section 12022, subdivision (a)(1), as to counts 2, 3, 8, 9 and 10.

The trial court sentenced Davis to prison for an aggregate term of 18 years 8 months. The court sentenced Tyson to prison for a total term of six years.

On appeal, Davis contends his conviction for making a criminal threat is not supported by substantial evidence. Tyson also appeals, contending he cannot be guilty of aiding and abetting a criminal threat because he lacked the same specific intent required to convict Davis. We disagree with both contentions and therefore affirm the judgments.

FACTUAL BACKGROUND

We view the evidence in the light most favorable to the judgment. (*People v. Gaut* (2002) 95 Cal.App.4th 1425, 1427.) On December 7, 2005, 17-year-old Brittany J. was living in a San Diego apartment with her grandparents Richard J. and Earnstine J. That evening, Brittany's friend Wilbert Grant (Wilby) called and asked her to come outside to talk. After meeting Wilby outside for two minutes, Wilby abruptly left and

told Brittany to call him in 20 minutes. Brittany testified she thought Wilby's behavior was odd.

Brittany began walking back to her apartment when two young men, later identified as Davis and Tyson, approached and began talking to her. Davis and Tyson asked Brittany her age and whether she had a boyfriend. Brittany thought Davis and Tyson were flirting with her and she wanted to get away. Brittany said goodbye and turned to leave, while Davis and Tyson stood near the stairs to her apartment.

Brittany opened the door to her apartment and went inside. When she tried to close the front door, one of the men stuck his foot in the door and pushed it open. Brittany screamed, and Davis and Tyson pushed in behind her and knocked her down. Davis fell on Brittany and put a gun to her head.

Brittany's grandfather tried to get up and help Brittany, but Davis pointed the gun at him and told him to sit down. Brittany's grandmother was also ordered to sit down and later testified she was afraid Davis would shoot her, her husband and Brittany.

Tyson said Brittany had something they wanted or something that was theirs. Tyson had pulled the hood of his sweatshirt over his head, concealed his face with a bandana and wore latex gloves. Tyson ordered Earnstine not to look at him.

Brittany was still on the floor crying when Davis put a gun to her forehead and demanded, "Tell me what you got." Brittany initially told Davis she did not have anything, but then remembered she had about $400 of savings in her bedroom. Davis held the gun to Brittany's back as they walked to her bedroom, and he closed the door behind them. Davis pushed Brittany onto the bed and searched the entire room before

finding the cash and her cellular phone. Brittany began to cry again, and Davis again threatened her, telling Brittany "he wouldn't shoot [her,] but he would hit [her] with the gun." Davis took the phone cord out of the wall to prevent her from calling 911 and screamed at Brittany to turn off the lights. Brittany later testified she complied with Davis's requests and did not try to escape because she was afraid of being shot.

Davis and Brittany then went back to the living room where Tyson was still guarding her grandparents. Davis told Tyson to rip out the telephones, and they fled the apartment.

Brittany screamed at Davis and Tyson as they fled and then immediately ran to her neighbors and called 911. Earnstine also called 911 from an undamaged phone in her bedroom. Brittany gave the dispatcher details of the robbery and described the robbers as two black males, one of whom wore a black hooded sweatshirt and a bandana over his mouth, while the other (the one with the gun) was dark skinned and wore a jacket and beanie.

The robbery was reported at 8:10 p.m. At 8:17 p.m. and only a couple of blocks from Brittany's grandparents' apartment, a San Diego police officer pulled over a red Camaro driven by Tyson for having a faulty break light. When Tyson stopped the car, Davis got out and ran away. The officer chased Davis down and arrested him. Davis at the time wore black clothing and a gray or black beanie hat. The officer searched Davis and found $390 in cash in his front pants pocket.

Detectives arrived at the traffic stop and saw that Davis and Tyson matched the suspect descriptions of the nearby robbery that had just occurred. Detectives searched

Tyson's car and found a black hooded sweatshirt with latex gloves in the pocket behind the driver's seat. Also behind the driver's seat detectives found a bandana and a backpack containing more latex gloves. A search of Tyson's person uncovered $48 in his left rear pants pocket. Officers searched for the gun but did not find it.

The officers took Brittany and her grandparents to view the two men at a curbside lineup. Brittany identified Davis and Tyson as the robbers and said the black sweatshirt and bandana found in Tyson's car were similar to the ones Tyson wore in the robbery. Richard and Earnstine also identified Davis as the man with the gun and identified Tyson based on the hooded sweatshirt.

Tyson presented an alibi defense. He testified he was picking up his girlfriend at Horton Plaza when his brother called and told Tyson to pick up Davis after he dropped off his girlfriend. Tyson claimed he picked up Davis at a 7-Eleven, and when police stopped him, Davis jumped out of the car and ran away. Tyson admitted he used latex gloves to work on his brother's Camaro and that the black hooded sweatshirt was his, but he denied knowing there were latex gloves in the sweatshirt pocket.

Tyson's girlfriend testified Tyson gave her a ride from Horton Plaza before 8 p.m. on the night of the robbery. Tyson's brother testified he was with Wilby until 11 p.m. the night of the robbery and the backpack found in the car belonged to Wilby. Tyson's brother also said he loaned his red Camaro to Tyson so he could pick up Tyson's girlfriend.

According to inmate records at the county jail, Wilby visited Davis on December 20 and 21, 2005. Wilby's description in his driver's license identification matched the description Brittany gave to police.

DISCUSSION

Substantial Evidence Supports Appellants' Convictions for Making Criminal Threats

1. *Standard of Review*

We apply the substantial evidence standard of review. (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1155.) In determining the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781], italics omitted; see also *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence−that is, evidence which is reasonable, credible, and of solid value−such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

2. *Davis and Criminal Threats*

Davis argues his conviction for making a criminal threat against Brittany, as charged in count 10, must be reversed because there was insufficient evidence that Brittany was in *sustained* fear for her own safety or for the safety of her grandparents for purposes of section 422.

To prove a violation of section 422, the prosecution was required to establish: "(1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat−which may be 'made verbally, in writing, or by means of an electronic communication device'−was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228 (*Toledo*).)

The reviewing court looks to all the surrounding circumstances to determine if there was substantial evidence to prove the elements of making a criminal threat. (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340.) In determining whether words constitute a threat within the meaning of the statute, the focus is not on the precise words uttered but rather on the effect of the words on the victim. (*People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1158.)

Here, the record contains substantial evidence satisfying *each* of the elements of section 422, including the "sustained fear" element. The evidence shows Davis (and Tyson) barged into the apartment where Brittany lived with her grandparents, knocked Brittany down and Davis put a gun to her head. Davis also pointed the gun at Brittany's

grandfather when he tried to help Brittany. While Brittany was on the floor crying, Davis pointed the gun at her a second time and said, "Tell me what you got." Brittany remembered she had about $400 of savings in her room. Davis held a gun to Brittany's back and made her take him into her bedroom where he closed the door, shoved Brittany onto the bed and searched her room. He threatened her again when she started crying and yelled at her to turn off the lights.

Brittany testified she complied with Davis's requests and did not try to escape because she was afraid of being shot by Davis. Brittany's grandmother also testified she was afraid Davis would shoot Brittany, her husband and herself.

This evidence is more than sufficient to support Davis's conviction for making a criminal threat under section 422. It shows that, separate and apart from the robbery itself, Davis willfully threatened Brittany (and her grandparents) with "death or great bodily injury" (*Toledo*, *supra*, 26 Cal.4th at p. 227) when he repeatedly pointed the gun at Brittany and her family during the course of the home-invasion robbery; that when Davis made these threats he had the specific intent that they be taken seriously; and that such threats were "unequivocal, immediate and specific," such as to convey to Brittany a "gravity of purpose and an immediate prospect of execution of the threat." (*Toledo, supra*, 26 Cal.4th at p. 227.)

This same evidence also supports the jury's findings that Brittany was reasonably and subjectively in sustained fear for her own safety and that of her grandparents. (CALCRIM No. 1300; see also *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536.) "Sustained" means "a period of time that extends beyond what is momentary, fleeting, or

transitory." (*People v. Allen, supra,* 33 Cal.App.4th at p. 1156; see also *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1140.) "The victim's knowledge of defendant's prior conduct is relevant in establishing that the victim was in a state of sustained fear." (*People v. Allen, supra,* 33 Cal.App.4th at p. 1156.) Calls to the police also provide evidence that a victim is in fear of the defendant. (*People v. Melhado, supra,* 60 Cal.App. 4th at p. 1538.)

In addition, after the home-invasion robbery, which lasted about nine or ten minutes, Brittany's grandmother called 911 and said, "Lord have Mercy, I, I was so scared I didn't know what to do," Brittany also got on the telephone with the 911 operator and described how she was afraid of being shot and killed during the robbery. Such evidence further supports the finding that Brittany was in "sustained fear" for her safety and the safety of her grandparents and that such fear was, under the circumstances, reasonable. (See *Toledo*, *supra*, 26 Cal.4th at p. 231; see also *People v. Allen*, *supra*, 33 Cal.4th at p. 1156.)[3]

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3 Davis relies on *In re Ricky T.*, *supra*, 87 Cal.App.4th at page 1136 to argue the evidence was insufficient that Brittany and her grandparents were in a state of "sustained fear" for purposes of section 422. However, under the substantial evidence standard of review, we are required to accept the findings of the jury so long as they are supported by sufficient evidence, even when there is substantial contrary evidence. (See *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874.) In any event, *In re Ricky T.* is distinguishable from the instant case, in that the criminal threat there was vague and made by a minor who told his teacher he was "going to get [him]" after the teacher accidentally struck the minor on the head while opening a door. (87 Cal.App.4th at p. 1135.) Such facts pale in comparison to the evidence in the present case, which show a violent home-invasion burglary in which Davis used a gun to threaten repeatedly Brittany and her grandparents.

3. *Tyson and Criminal Threats*

There was also substantial evidence in the record showing Tyson aided and abetted Davis in making the criminal threats, and thus was liable as a co-conspirator for the foreseeable criminal acts of his partner.

" 'All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed.' " (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1122 (*Mendoza*).) Thus, an aider and abettor " 'shares the guilt of the actual perpetrator.' " (*Ibid*.)

"The mental state necessary for conviction as an aider and abettor, however, is different from the mental state necessary for conviction as the actual perpetrator." (*Mendoza*, *supra*, 18 Cal.4th at p. 1122.) "The actual perpetrator must have whatever mental state is required for each crime charged . . . . An aider and abettor, on the other hand, must 'act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.] The jury must find 'the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense . . . .' [Citations.] Once the necessary mental state is established, the aider and abettor is guilty not only of the intended, or target, offense, but also of any other crime the direct perpetrator actually commits that is a natural and probable consequence of the target

offense. [Citation.]" (*Id*. at p. 1123; see also *People v. Prettyman* (1996) 14 Cal.4th 248, 259 [an aider and abettor "shares the guilt of the actual perpetrator"].)

Here, Tyson not only acted with knowledge of Davis's criminal purpose, he directly participated in committing the robbery. While Davis took Brittany to the bedroom at gunpoint, Tyson helped facilitate the robbery by standing watch over her grandparents, intimidating them and ensuring they did not interfere with the robbery.

Viewing the facts in the light most favorable to the People (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 326), the evidence shows Tyson was not an innocent bystander, but instead was a direct participant in the violent robbery. Because there was sufficient evidence Tyson conspired to commit, and aided and abetted, the robbery, Tyson was responsible for Davis's criminal threats, which were a natural and probable consequence of the robbery.

DISPOSITION

The judgments are affirmed.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

IRION, J.